Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN THOMAS CLOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition For Writ Of Certiorari

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Questions Presented

Issue No. 1: Whether a debtor "commences an action" within the meaning of 11 U.S.C. 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.

Issue No. 2: Whether dismissal of a criminal cause on the basis of prosecutorial misconduct, standing alone, charges a claimant with "awareness of the connection between the wrongful indictment and the defendant's misconduct" such that a claim for malicious prosecution accrues upon acquittal.

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JOHN THOMAS CLOUD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit
Case No. 01-20079

John Thomas Cloud petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit

Citations to the Opinions and Orders Entered Below

The opinion of the Fifth Circuit Court of Appeals is reported at 281 F.3d 158 (5th Cir. 2001) (**Pet. App. A**) The opinion of the trial court in the civil suit for malicious prosecution, *Cloud v. U.S.*, is reported at 126 F. Supp.2d 1012 (S.D. Tex. 2000)(**Pet. App. B**) The opinion of the trial court dismissing the criminal cause against Cloud and others, *U.S. v. Ramming, et al.* is reported at 915 F.Supp. 854 (S.D. Tex. 1996). (**Pet. App. C**). The opinion of the trial court in the consolidated civil suit for malicious prosecution, *Ramming v. U.S.*, is not reported. (**Pet. App. D**) The order of the Fifth Circuit Court of Appeals denying Appellant's Motion for Rehearing is not reported. (**Pet. App. E**)

Jurisdiction

The United States District Court for the Southern District of Texas exercised jurisdiction over this cause pursuant to 28 U.S.C. §1331. The Fifth Circuit exercised jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This Court has jurisdiction as follows:

On December 22, 2000, the district court granted the Government's FED.R.CIV.P. 12 motion to dismiss. Cloud timely filed his notice of appeal with the United States Court of Appeals for the Fifth Circuit on January 18, 2001. The Fifth Circuit affirmed the district court judgment on December 19, 2001. Appellant timely filed his motion for rehearing in a cause involving the United States on February 4, 2002, which was denied on February 18, 2002. Petitioner timely files this Petition for Writ of Certiorari prior to May 19, 2002.

This Court has jurisdiction over Cloud's Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with decisions of district and courts of appeals on the same important matter; to wit, interpretation and administration of 11 U.S.C. § 108 of the Bankruptcy Code concerning the tolling of statutes of limitations provided by other nonbankruptcy laws.

Federal Statutes Involved

28 U.S.C. § 2401, Time for Commencing Action Against U.S., provides:

> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2675, Disposition by Federal Agency as Prerequisite; evidence, provides:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

11 U.S.C. § 108, Extension of Time, provides:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or

1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Statement of the Case

A. Course of Proceedings and Disposition in Court Below

This malicious prosecution cause arises from the criminal prosecution (*U.S. v. Ramming, et al.)* and subsequent acquittal of Appellant Thomas J. Cloud ("Cloud") and co-plaintiff below Lawrence H. Ramming ("Ramming") (Opinion at Pet. App.C). Following their acquittal, Cloud and Ramming filed separate civil actions for malicious prosecution; the district court consolidated the cases. The district court first dismissed Ramming's claims on July 27, 2000, granting the Government's FED.R.CIV.P. 12(b) motion. (Pet. App. D). On December 22, 2000, in a published decision, the district court granted the Government's same motion as to Cloud's claims, incorporating much of the reasoning underlying the earlier Ramming dismissal. (Pet. App. B) Cloud timely filed his notice of appeal on January 18, 2001. Ramming did not appeal.

The Fifth Circuit Court of Appeals affirmed the judgment of the district court holding, as a matter of law, that (a) a debtor's time for complying with § 2401 of the FTCA is tolled six months under § 108(b), rather than 24 months under §§ 108(a); and (b) this FTCA claim for malicious prosecution accrued on the date of the judgment of acquittal because the acquittal arose from prosecutorial misconduct. (Pet. App. A) The decision was subsequently ordered published. The Fifth Circuit denied Cloud's motion for rehearing. (Pet. App. E) Cloud now files this Petition for Writ of Certiorari.

B. Statement of Facts

In 1994, the United States of America obtained a 27-count indictment against Cloud and others (including co-plaintiff Ramming) arising from alleged bank fraud, money laundering, etc. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D.

Tex. 1996) (Pet. App. C) After receiving all evidence in the case, the district court entered January 12, 1996, judgment of acquittal in favor of all defendants without putting the issues to the jury. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D. Tex. 1996) (Pet. App. C) Judge Hoyt's written opinion grants Defendants' motion to dismiss based upon prosecutorial misconduct, associated primarily with *Brady* violations; significantly, his opinion also *denies* defendants' motion to suppress because he finds that *probable cause* existed. *Id.* at 867. (Pet. App. C)

On November 26, 1997, Cloud filed his Chapter 11 petition in bankruptcy and became a debtor in possession. The undisputed evidence shows that in December, 1998, Cloud first learned that grand jury transcripts from *U.S. v. Ramming* had been released and that those transcripts revealed the prosecution's prior malicious intent to pursue a groundless indictment against Cloud and the others. On March 18, 1999, Cloud sent his administrative claim to the Government. On October 20, 1999, the Government sent Cloud's counsel notice that the administrative claim was denied. On December 30, 1999, Cloud filed this suit against the Government.

Reasons for Granting the Writ

Issue No. 1 **Whether a debtor "commences an action" within the meaning of 11 U.S.C. § 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.**

Section 108 of the Bankruptcy Code extends the time periods within which a debtor may take certain legal action or have such action taken against him/her. The dispute here turns upon whether the debtor's deadlines under the FTCA are extended by the two-year tolling provision of the Code (§ 108(a)) or by the six-month tolling provision of the

Code (§ 108(b)). More specifically, the question is whether a debtor "commences an action" within the meaning of 11 U.S.C. § 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.

A. Conflicting Case Authority

District and appeals courts present conflicting decisions on the construction of 11 U.S.C. §§108(a) and 108(b). One line of cases, beginning more than fifty years ago, holds that when the nonbankruptcy limitations period at issue constitutes a condition precedent to suit, the two-year extension applies. In *Engstrom v. De Vos*, 81 F.Supp. 854 (D.C.E.D. Wash. 1949), the court construed 11(e)[1], to

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1 Section 11(e), the predecessor to 108, provided that:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings on behalf of the estate upon any claims against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any at, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankruptcy may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be. 11 U.S.C. § 11(e).

preserve the trustee's right to recover an alleged unlawful preference. The trustee sued under a state statute which allowed recovery of a preference made by an insolvent corporation. *Id.* at 856. The statute limited the right of action, however, by requiring that the preference occur within four months of the date of the application for appointment of trustee, and that the action be commenced within six months thereafter. *Id.* The court found that § 11(e) superceded these limitations. *Id.* at 859. Because of Congress's broad power in the field of bankruptcy to alter both procedural and substantive rights, the time period for exercise of the trustee's right of action was extended two years. *Id.*

Agreeing with *Engstrom*, the Fifth Circuit later concluded that provisions of substantive right, that is, statutes containing conditions precedent to recovery, are tolled by § 108(a). *See Dower v. Bomar*, 313 F.2d 596, 599 (5th Cir. 1963). At that time, the *Dower* court rejected the narrow reading of "commenced" as applying to statutes of limitation alone; instead, the Court determined that the time period within which the debtor had to declare a loan as usurious, though a condition precedent to penalties and forfeiture, was tolled for two years by § 11(e), the predecessor to 108(a). *Id.*

Articulating the difference between the two tolling statutes, one court writes that §108(a) governs limitations periods that are statutory prerequisites and §108(b) governs the other extensions of time. *See Weiner v. Sprint Mortgage Bankers Corp.*, 235 A.D. 2d 472, 652 N.Y.S. 2d 629 (Supreme Court, App. Div., 2d 1997) (holding that "[w]hen a Statute of Limitations also constitutes a 'statutory prerequisite' the extension of time in bankruptcy is governed by 11 U.S.C. § 108(a)"). The *Weiner* court notes that "[w]here the time limit in issue does not require the commencement of an action within that period, the extension of time in bankruptcy is governed by [the six-month provision,] 11 U.S.C. § 108(b)." *Id.* at 631. The FTCA, by contrast, does require

commencement of an action within the periods outlined in 11 U.S.C. § 2401. Therefore, under the *Weiner* analysis, §108(a) governs.

Most courts agree with the *Weiner* analysis. Section 108(a) tolls statutory time periods when such time periods constitute a condition precedent to asserting a cause of action. *See T.C.I, Ltd. v. Sears Bank & Trust Co*, 21 B.R. 876 (Bankr. N.D. Ill. 1982). Because presentment of an administrative claim is a prerequisite to a Federal Tort Claims Act suit, the tolling provision of 11 U.S.C. §108(a) should apply.

There are two courts that differ: The Fifth Circuit, in this case and *TLI, Inc. v. U.S.*, 100 F.3d 424 (5th Cir. 1996), and the D.C. Circuit in *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 639 (D.C. Cir. 1991).[2] These cases depart dramatically in their analysis of the Bankruptcy Code tolling provisions. Instead of focusing upon the purposes of the statutes, these courts turn to a non-scientific analysis of "commence an action."

In *Eagle-Picher*, the Court examined the timeliness of asbestos manufacturer GNR's FTCA claims seeking contribution and indemnity from the Government for shipyard workers' asbestos-injury claims. *Id.* GNR argued that its voluntary petition for bankruptcy tolled its obligation to meet § 2401 for two years. *Id. Eagle-Picher*, too, resolved the question against the debtor and held that the debtor's deadlines under § 2401 of the FTCA were governed by the six-month provision of 11 U.S.C. § 108(b), rather than 108(a).

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[2] The *Eagle-Picher* decision was not referenced by the Fifth Circuit Court of Appeals in this case, though it was relied upon by the district court below.

Eagle-Picher was not resolved based upon statutory interpretation. Rather, the basis for Judge Ginsburg's opinion in *Eagle-Picher* was the conclusion that FTCA presentment is more like a proof of claim than a lawsuit because "presentment requires only 'minimal notice,'" and is, therefore, "far less costly and far easier than the initiation of an action against a nongovernmental tortfeasor." *Id.* at 322.

The *Eagle-Picher* court could not be more wrong about presentment of an FTCA claim. Proper compilation of an administrative claim for presentment under the FTCA is actually *more onerous* than filing suit. Filing suit under FED.R.CIV.P. 8 and 11 requires that the trustee/plaintiff prepare a short, plain statement of the claim that is warranted by existing or anticipated law and is supportable by evidence. On the other hand, the FTCA commands that the administrative claim be in writing to the appropriate federal agency. 28 U.S.C.A. § 2675(a). Therefore, the trustee must investigate to determine the appropriate federal agency.

Further, the applicable federal regulations require submission of: (1) evidence of authority - 28 C.F.R. § 14.3; and (2) a demand for a sum certain, to which the claimant is bound in the future - 28 C.F.R. § 14.2(a). Most plaintiffs do not demand a sum certain until closing argument at trial. But, the trustee must do so upon the presentment of a FTCA administrative claim.

Finally, 28 C.F.R. § 14.4 outlines the types of **evidence** that the trustee must submit in support of the administrative claim. For a personal injury claim, for example, § 14.4(b) requires:

(1) a report from the claimant's attending physician;

(2) itemized bills for medical expenses incurred;

(3) a statement of anticipated future medical expenses;

(4) an employer statement of actual time/wage lost.

The process for preparing a claim under the FTCA is far more complex, and time consuming, than filing a lawsuit. *See, generally,* "When is a Claim Properly Presented to Federal Agency, Under 28 U.S.C.A. § 2675(a), for Purposes of Satisfying Prerequisite to Subsequent Suit Under Federal Tort Claims Act," 73 A.L.R. Fed. 338 (1999 Supp.). In short, to file a federal suit, a trustee/plaintiff must have a good faith basis for the claim; to file a FTCA claim, a trustee/plaintiff must already possess *prima facie* evidence. Thus, the factual underpinnings of the *Eagle-Picher* court's conclusion was completely flawed.

The Fifth Circuit's decisions are similarly flawed for their lack of *bona fide* analysis of the purposes of the statutes. Both here and in *TLI* the Fifth Circuit provides no explanation for departing from prior case law, including its own. The Fifth Circuit cites no change in legislative language or purpose to support its new view that "commence" no longer encompasses both the filing of suit and the satisfaction of conditions precedent to filing suit.

The more pointed error in construction of the specific statutes here is the utter disregard for the language of the FTCA. The Court did not need to guess when an FTCA action commences; Section 2401 of the FTCA, regarding both presentment and filing suit, is entitled "Time for Commencing Action Against United States." Section 108(a) was intended by Congress to provide a trustee with two additional years to "commence the action"; that same Congress described commencing an action under the FTCA

as a two-step process: (1) presenting the claim to the agency; and (2) filing suit if the agency denies the claim. The Fifth Circuit ignored that plain language and resorted to § 108(b).

The six-month tolling of subsection (b) was intended by Congress to be a residual provision that gives the trustee 60 days to perform acts not covered under subsection (a)." *See* Collier on Bankruptcy 108.02, p. 108-5. The House Judiciary Report accompanying the Bankruptcy Act specifically refers to insurance claims as an example of the type of claim entitled to a sixty-day extension. *Id.* Courts following the legislature's example have generally applied the six-month tolling of § 108(b) to matters that are outside of the context of litigation:

> *Counties Contracting & Const. v. Const. Life Ins. Co.*, 855 F.2d 1054 (3d Cir. 1988) (applying 108(b) to statutory grace period for payment of insurance policy premiums);
>
> *Johnson v. First Nat. Bank, Montevideo, Minn.*, 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984)(applying 108(b) to redemption of mortgaged property);
>
> *In re Santa Fe Development & Mortg. Corp.*, 16 B.R. 165 (Bankr. 9th Cir. 1981) (applying 108(b) to options to purchase property);
>
> *In re Lauderdale Motorcar Corp.*, 35 B.R. 544 (Bankr. S.D. Fla. 1983) (applying 108(b) to the curing of any default under an agreement).

The legislative history supports but one construction of the Bankruptcy tolling provisions as applied to the Federal Tort Claims Act: Section 108(a) provides two years from the date of a voluntary bankruptcy petition in which to present a claim to the appropriate government agency.

B. Public Policy

Public policy demands that § 108(b) apply to presentment of claims under § 2401(b). The core purpose of bankruptcy law is to augment or maximize the value of the bankruptcy estate. *See Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 351-354 (1985). Section 108 fundamentally serves that purpose because it gives breathing room to take legal action–action otherwise barred by limitations– to enhance the assets of the estate. However, the Fifth and D.C. Cir. construction of the statutes gives the trustee two years to file suit, but six months to present an FTCA claim. Clearly, **a two year extension for filing an FTCA suit is meaningless if the suit is barred upon the failure to muster an administrative claim in sixty days.**[3]

C. The Law as Applied to Cloud's Claims

The following are undisputed facts that, when applied to the law and policy above, show that Cloud's bankruptcy petition tolled the time period to present his administrative claim until November, 1999, even if Cloud's cause of action accrued no later than the date of acquittal.

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[3] Sixty days actually represents the maximum amount of time allotted. Since the tolling provisions of § 108 run from the date of the filing of the petition, not from the date of the appointment of the trustee, what appears to be a sixty-day tolling for presentment of an FTCA claim is really a sixty-day tolling for appointment of a trustee and presentment of an FTCA claim. *See* 11 U.S.C. § 108(b).

Date	Undisputed Facts
January 12, 1996	Judge Hoyt grants a motion for judgment of acquittal and a motion to dismiss for prosecutorial misconduct. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D. Tex. 1996).
November 26, 1997	Cloud files a Chapter 11 petition in bankruptcy and subsequently becomes a debtor in possession.
March 18, 1999	Cloud sends his administrative claim to the Government.
October 20, 1999	The Government sends Cloud's counsel notice stating that the administrative claim is denied and he has six months to file suit.
December 30, 1999	Cloud files this suit against the Government.

The above time line shows that Cloud's deadline to commence the action expired to earlier than January 12, 1998. However, Cloud filed in Chapter 11 petition in bankruptcy prior to that date. Section 108(a) then provided Cloud with an additional two years to commence the action. So long as he commenced the action by November 26, 1999, his subsequent suit was timely.

As it is undisputed, and indisputable as the time line shows, that Cloud filed his lawsuit within six months after receipt of the final denial of his claim as required by 2401(b), the decision of the Fifth Circuit should be reviewed and reversed.

Issue No. 2 **Whether dismissal of a criminal cause on the basis of prosecutorial misconduct, standing alone, charges a claimant with "awareness of the connection between the wrongful indictment and the defendant's misconduct" such that a claim for malicious prosecution accrues upon acquittal.**

A. Federal Accrual of Claims

The statute of limitations and the accrual of claims are governed by federal law. *Brown v. NationsBank Corp.*, 188 F.3d 579 (5th Cir. 1999). Under federal law, a cause of action accrues or "the limitations period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *Russell v. Board of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992 (*quoting Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987)), *cert. denied*, 113 S.Ct. 1266 (1993). A plaintiff's awareness encompasses two elements: (1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions. *See Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.), *cert. denied*, 506 U.S. 820 (1992).

A plaintiff need not realize that a legal cause of action exists in order for the limitations period to begin; but the plaintiff does need to know the facts that would support the claim. *See Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983). Those facts must be of a quality to "lead a reasonable person (a) to conclude that there [is] a causal connection . . . or (b) to seek professional advice." *Id.*

To prevail on a malicious prosecution claim, the Fifth Circuit, applying Texas law, requires the plaintiff to show that:

(1) a criminal action was commenced against him;

(2) the prosecution was caused by the defendant or with his aid;

(3) the action terminated in the plaintiff's favor;

(4) the plaintiff was innocent;

(5) the defendant acted without probable cause;

(6) the defendant acted with malice in filing the charge; and

(7) the criminal proceeding damaged the plaintiff.

See Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997); *see also, Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994).

Prosecutorial misconduct is a term that covers a wide spectrum of conduct including: (a) questioning by prosecutors that elicits inadmissible testimony; (b) questioning of defendant and defense witnesses that elicits prejudicial evidence; (c) questioning or making comments that improperly bolsters the credibility of prosecution witnesses; (d) offering false, inadmissible, or misleading evidence; (e) presenting false or misleading displays or demonstrations; (f) offering inflammatory evidence; (g) making false or misleading remarks; (h) making inflammatory remarks; (i) misstating the evidence; (j) disparaging defense counsel; and (k) asking questions or making comments that impair a defendant's exercise of his constitutional right to remain silent after being given Miranda rights are some examples *See* Gersham, Bennett, *Mental Culpability and Prosecutorial Misconduct*, 26 Am. J. Cr. L. 121, 128 (Fall 1998). Very little of this conduct approaches malicious prosecution.

B. The Law as Applied to Cloud's Claims

1. A judicial finding of "probable cause" is inconsistent with accrual of a malicious prosecution claim as a matter of law.

Until the decision in this case, no court had previously held that when a defendant obtains a judgment of acquittal based in part upon allegations of prosecutorial misconduct, his cause of action for malicious prosecution accrues as a matter of law. Here, the Fifth Circuit determined that "Judge Hoyt's unequivocal iteration of examples of prosecutorial misconduct leaves little doubt that, at the time of Appellant's acquittal, Appellant had ample evidence of essential facts which would support the possible existence of a claim for malicious prosecution." *Cloud v. U.S.*, 281 F.3d 158, 163 (5th Cir. 2001)(Pet. App. A). The Fifth Circuit overlooked the portion of Judge Hoyt's opinion that concluded that the Government proceeded with **probable cause**. See *U.S. v. Ramming*, 915 F.Supp. 854, 867 (S.D. Tex. 1996)(Pet. App. C).

Although the Fifth Circuit outlines a "litany of misconduct" that supported Judge Hoyt's decision to enter a judgment of acquittal, the Court did not point out that Judge Hoyt also denied defendants' motion to suppress, finding that "even if the affiant, FBI Agent Tom Conlon, included false statements in his affidavit for search warrant, there was sufficient other evidence to support probable cause for its issuance." *U.S. v. Ramming*, 915 F. Supp. 854, 867 (S.D. Tex. 1996)(Pet. App. C). Judge Hoyt further stated that Conlon's affidavit was "mistaken on the law." *Id.* Thus, Judge Hoyt stood firm on the existence of **probable cause**.

Also, the instances of prosecutorial misconduct outlined in Judge Hoyt's opinion and in this Court's opinion were overwhelmingly pre-trial and trial misconduct that were unrelated to securing Cloud's indictment. Thirteen of

fourteen pages of the decision outlined the inadequacies of the evidence mustered against the defendants at trial; thus, the Court granted the motion for judgment of acquittal. The remaining page addressed and granted defendants' motion to dismiss based upon allegations of prosecutorial misconduct. *Id.* at 867. Five of the eight grounds involved *Brady* violations (*i.e.* pre-trial misconduct) and the remaining three grounds involved opening statement actions and misrepresentations to the Court (*i.e.* **trial misconduct**).

Judge Hoyt's remaining remarks were directed toward his review of the Grand Jury testimony. Specifically, in outlining the prosecutorial infractions, Judge Hoyt concluded that the prosecution violated a duty "not [to] prosecute where the evidence at best is disputed." *Id.* at 868 *citing Berger v. U. S.*, 295 U.S. 78 (1935). *Berger* teaches that prosecutors have a unique obligation to ensure that "guilt shall not escape or innocence suffer." *Berger v. U.S.*, 295 U.S. at 88. However, to say that a prosecutor inappropriately pursued a weak case and used improper techniques to ensure a conviction in that weak case is not the same as saying that obtaining the indictment in the first instance was malicious prosecution. Such a leap is especially inappropriate where, as here, there is **probable cause** in the first instance.

C. The Record Evidence Forecloses Accrual at Acquittal as a Matter of Fact

John Thomas Cloud's unchallenged affidavit is part of the record below. In it, Cloud not only tells the facts of which he was aware from Judge Hoyt's opinion (acquittal and overzealous prosecution), he also describes the **facts** of which he was not aware. First, Cloud states that he did not know that "[t]he Government knew at the Grand Jury phase that it did not have sufficient evidence to prosecute and knew that witnesses were being threatened by the Government to persuade them to give false testimony."

As to the legal standard, Cloud did not possess any facts in support of at least two of the seven elements of a malicious prosecution claim: (1) that the defendant acted without probable cause; and, (2) that the defendant acted with malice in filing the charge. Specifically, Cloud outlines eight instances of factual information revealed by the grand-jury transcripts that, for the first time, alerted Cloud to the lack of probable cause to support the prosecution and the malice underlying the prosecution. Based upon the information in the grand-jury transcripts, Cloud testifies that it was not until December, 1998, that he suspected Government's bad motive in the *Ramming* prosecution.

Both courts below ignored this evidence in total. The Fifth Circuit relied solely upon excerpted portions of the judgment of acquittal to find accrual. *Cloud v. U.S.*, 281 F.3d 158, 163 (5th Cir. 2001)(Pet. App. A). The district court, on the other hand, characterized the "evidence" concerning accrual of Cloud's FTCA claim as the same as the evidence of co-plaintiff Ramming. *See Cloud v. U.S.*, 126 F.Supp.2d 1012 (S.D. Tex. 2000)(Pet.App. B). However, Ramming submitted no evidence at all regarding what he knew and when he knew it. *See Ramming v. U.S.* (Pet. App. D). By contrast, Cloud filed his own affidavit setting forth specific facts about when and how he learned facts supporting his FTCA claim.

Both lower courts also concluded that Cloud failed to conduct a diligent inquiry into the basis for his FTCA claim. Assuming *arguendo* the truth of the factual finding, the lack of inquiry is legally irrelevant where, as here, inquiry would not have led to the discovery of facts. A plaintiff's failure to "investigate further" when circumstances would lead a reasonable person to do so is only fatal to its accrual argument if that investigation would have led to actual knowledge. *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995) (citing *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988)) (holding that

"[u]nder federal law, the limitations period commences when 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof"). Here, even if Ramming or Cloud had conducted an investigation or had attempted to obtain the *Ramming, et al.*, grand-jury transcripts, their efforts would not have lead to receipt of the information any earlier than June, 1997. Cloud's evidence, District Judge Lynn Hughes' order releasing the grand-jury transcripts to the plaintiff in *Licata v. U.S.*, Civil Action H-97-93, reflects that Cloud's co-defendant Licata filed suit very soon after the acquittal and immediately attempted to obtain the grand-jury transcripts. He did not actually obtain them until June 12, 1997.

This unusual evidence eliminates any need or any latitude for the trial court to guess at what might have happened if Cloud had conducted the investigation that the Court believes was appropriate. We know as a matter of fact and a matter of law that the diligence demanded by the trial court would not have lead to actual knowledge prior to June, 1997. Therefore, Cloud's FTCA claims could not have accrued any earlier than June, 1997, making his March, 1999, administrative claim timely.

D. Public Policy

From a public policy standpoint, the Fifth Circuit's approach to accrual of malicious prosecution is a slippery slope because its adjudges accrual as a matter of law from the context of acquittal. Equating prosecutorial misconduct with malicious prosecution will broaden this narrow cause of action. Further, the district court's approach is equally problematic. Although the Court purports to resolve accrual as a question of fact, the Court ignores all facts but those favoring the Government.

Conclusion

Cloud suffered a protracted federal criminal prosecution that the United States must concede was wrongful. The Fifth Circuit has sent the United States a published message in this case: The more wrongful and devastating the Government's baseless prosecution, the more likely the Government is to avoid punishment. A citizen driven to bankruptcy by the malicious acts of its government representatives needs the full protections intended by Congress in enacting § 108 of the Bankruptcy Code more than anyone else. This Court should review and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

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